ONG THYE PENG

v.

LOO CHOO TENG & ORS

COURT OF APPEAL, KUALA LUMPUR
MOHD NOOR AHMAD FCJ
RICHARD MALANJUM JCA
MOHD GHAZALI YUSOFF JCA
[CIVIL APPEAL NO: P-02-804-2000]
9 APRIL 2004

TRUSTS: *Trust property - Sale - Sanction of court - Trustees entering into agreement to sell property in 1979 - Sanction obtained in year 2000 - Sale price thereof - Whether to be market price at time of application for sanction - Whether to be price as agreed to in 1979 - Whether agreement valid and binding - Probate and Administration Act 1959, s. 60(4) - Applicability*

TRUSTS: *Trust property - Sale - Leave to sell trust property - Sanction of court - Whether judge had exercised discretion judiciously in granting sanction*

By an agreement dated 8 January 1979 ('the agreement'), the trustees sought to sell the trust property ('the property') to the purchasers for RM1.60 per square foot. The agreement was executed pursuant to a court order allowing the trustees to sell off the property. Clause 8 of the agreement mandated the trustees to apply to the court for "a formal sanction" to sell the property in accordance with the Probate and Administration Ordinance 1959. Sometime in 1974, the State Government of Penang, by its Gazette Notification, declared an intention to acquire the property at RM0.60 per square foot. The trustees, however, had failed to apply for the sanction, not even after the property was released from the intended acquisition in 1984. In the meanwhile, by Penang High Court Civil Suit No. 8 of 1981 ('the 1981 civil suit'), in which the appellant, a beneficiary of the property, was also made a defendant, the purchasers instituted proceedings against the trustees for specific performance of the agreement. Specific performance was then ordered by the learned judge, whereupon the trustees (and the appellant, separately) appealed. The Court of Appeal (in the year 2000), whilst dismissing the appeal and upholding the learned judge's order, decreed that the trustees "apply for formal sanction as provided in cl. 8 of the agreement". The trustees, in consequence, applied to the High Court for sanction: (i) to sell the property pursuant to cl. 8 of the agreement; and (ii) to sell the property to the purchasers at the prevailing market

value (which was much higher than RM1.60 per square foot). The learned judge granted the first application, namely for the trustees to sell the property at RM1.60 per square foot, but refused the second prayer. Aggrieved, the appellant appealed.

Before the learned appellate judges herein, the appellant argued, essentially and upon the authorities of *Yap Yoke Luan & Anor v. Ong Wee Tok & Ors, Che Ah and Che Yang Kelsom v. Che Ahmad* and *In Re The Estate of Tunku Mohmed Jewa ibni Almarhum Sultan Abdul Hamid*, that: (i) sanction ought to be refused considering the property's unreasonably low price of RM1.60 per square foot; and (ii) it was wrong of the High Court to have acted like a "rubber stamp" when granting sanction. The issue that arose was whether the learned judge, in granting sanction for the sale of the property upon the terms of the agreement, namely at RM1.60 per square foot, had under the circumstances exercised his discretion judiciously.

Held:
Per Mohd Noor Ahmad FCJ

[1] As RM1.60 per square foot was reflective of the then market price it was manifestly evident that the trustees had obtained the best price for the beneficiaries of the estate.

[2] The accepted principles as adopted by the courts in the authorities cited were clear. Nonetheless, facts could vary from case to case, such as to make the present case distinguishable from those cases. It would thus be unwise to apply the established principles as a straightjacket to the case under scrutiny.

[3] The learned judge, in departing from the principles established in the cases cited, was not wrong both on principle and in commonsense. On principle, if the test of reasonableness of the price was to be based on the market value of the property at the time of the hearing of the application for sanction, that would militate against two other principles of law, namely, that the court could not rewrite the parties' agreement and that no party ought to take advantage of his own wrong. In any case, on the facts and in the surrounding circumstances, the learned judge had exercised his discretion judiciously on the matter before him and his decision therefore needed no appellate interference.

Per Mohd Ghazali Yusoff JCA

[1] There was no merit in the appellant's argument. The evidence showed that the appellant and the other beneficiaries were fully aware of the agreement, the price and the 1981 civil suit. It was also evident that learned judge, in granting sanction, had confined it to the terms of the agreement and the relevant date thereof. The appellant and the other beneficiaries, further, did not object to the sale at the material time. It was also not disputed that the agreed price of RM1.60 per square foot was supported by a valuation report and that the acquisition value of the property was only RM0.60 per square foot.

[2] The purchasers were right in the contention that s. 60(4) of the Probate and Administration Act 1959 had no bearing upon the circumstances here. The effect of the provision was that a sale of immovable property by an administrator would not be binding or enforceable unless he had the previous permission of the court. That provision is certainly not applicable here, as the trustees, whose prime duty was to carry out the terms of the trust, already had the power to sell prior to entering into the agreement.

[3] The authorities referred to by the appellant, namely *Yap Yoke Luan & Ors v. Ong Wee Tok & Ors, Che Ah and Che Yang Kelsom v. Che Ahmad* and *In Re The Estate of Tunku Mohmed Jewa ibni Almarhum Sultan Abdul Hamid* were distinguishable on the facts. They were dealing with conditional contracts of sale of immovable property entered into by administrators of estates which required leave of the court. On the contrary, in the present case, the trustees had the power to sell and in exercising that power, had taken into regard the rights of the beneficiaries including obtaining their prior consent. This aside, the beneficiaries had agreed to the sale at RM1.60 per square foot and the agreement was also valid and binding. Consequently, the only thing left to be done by the trustees was to apply to court for a formal sanction to sell the property.

[4] In granting sanction, the learned judge held that sanction must be determined with reference to the agreed price and that the agreed price of RM1.60 per square foot at the date of the agreement was the best price obtained for the beneficiaries. The learned judge clearly had taken all factors into consideration and there was nothing wrong with his exercise of discretion. The learned judge had meticulously considered all the facts and the surrounding circumstances and had not acted like a "rubber stamp" when granting sanction.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Melalui perjanjian bertarikh 8 Januari 1979 ('perjanjian'), pemegang amanah berhasrat untuk menjual harta amanah ('harta') kepada pembeli pada harga RM1.60 se kaki persegi. Perjanjian dimeterai ekoran satu perintah mahkamah yang membenarkan pemegang amanah menjual harta. Fasal 8 perjanjian mewajibkan pemegang amanah memohon kepada mahkamah untuk mendapatkan 'sanksi rasmi' selaras dengan Ordinan Probet dan Pentadbiran 1959. Pada tahun 1974, Kerajaan Negeri Pulau Pinang, melalui Pemberitahuan Gazetnya, telah mengisytiharkan niat untuk mengambil harta pada harga RM0.60 se kaki persegi. Pemegang amanah, walau bagaimanapun, gagal memohon sanksi, walaupun selepas harta dilepaskan dari sebarang pengambilan pada tahun 1984. Sementara itu, melalui Guaman Sivil Mahkamah Tinggi Pulau Pinang No. 8 Tahun 1981 ('guaman sivil 1981'), di mana perayu, seorang pewaris harta, juga dinamakan sebagai defendan, pembeli telah mengambil tindakan terhadap pemegang amanah dan menuntut pelaksanaan spesifik perjanjian. Pelaksanaan spesifik dibenarkan oleh yang arif hakim, berikutan mana pemegang amanah (dan perayu, secara berasingan) merayu. Mahkamah Rayuan (dalam tahun 2000), dalam menolak rayuan dan mengesahkan keputusan yang arif hakim, memerintahkan supaya pemegang amanah "memohon untuk mendapat sanksi rasmi sebagaimana yang diperuntukkan oleh Fasal 8 perjanjian". Pemegang amanah, dengan itu, memohon kepada Mahkamah Tinggi bagi mendapatkan sanksi bagi: (i) menjual harta mengikut Fasal 8 perjanjian; dan (ii) menjual harta pada harga pasaran semasa (yang lebih tinggi dari harga RM1.60 se kaki persegi). Yang arif hakim membenarkan permohonan pertama, yakni supaya pemegang amanah menjual harta pada harga RM1.60 se kaki persegi, tetapi menolak permohonan kedua. Terkilan, perayu merayu.

Di hadapan yang arif hakim-hakim rayuan di sini, perayu berhujah, secara inti dan berdasarkan autoriti-autoriti *Yap Loke Luan & Anor lwn. Ong Wee Tok & Ors, Che Ah and Che Yang Kelsom lwn. Che Ahmad* dan *In Re The estgate of Tunku Mohmed Jewa ibni Almarhum Sultan Abdul Hamid*, bahawa: (i) sanksi patut ditolak memandangkan harga RM1.60 se kaki persegi yang begitu tidak munasabah rendahnya; dan (ii) Mahkamah Tinggi adalah silap bila hanya bertindak sebagai "rubber stamp" sewaktu membenarkan sanksi. Isu yang berangkit adalah sama ada yang arif hakim, dalam membenarkan sanksi bagi penjualan harta berdasarkan terma perjanjian, iaitu pada RM1.60 se kaki persegi, telah dalam keadaan yang wujud melaksanakan budibicaranya secara penuh kehakiman.

Diputuskan:
Oleh Mohd Noor Ahmad HMP

[1] Oleh kerana RM1.60 se kaki persegi mencerminkan harga pasaran pada waktu itu ianya jelas bahawa pemegang amanah telah pun mendapatkan harga yang terbaik untuk pewaris-pewaris pusaka.

[2] Prinsip-prinsip yang diterima sepertimana yang digunapakai oleh autoriti-autoriti yang dirujuk adalah jelas. Walau bagaimanapun, fakta-fakta mungkin tidak sama antara satu kes dengan kes yang lain sekaligus menjadikan kes semasa berbeza dari kes-kes yang dirujuk. Prinsip-prinsip yang digunapakai tersebut, dengan itu, tidak harus diambil sebagai acuan yang boleh dilaksanakan dengan sewenangnya kepada kes semasa.

[3] Yang arif hakim, dalam menyimpang dari prinsip-prinsip dalam kes-kes yang disebut, tidak salah sama ada dari segi prinsip mahupun akal budi. Di segi prinsip, sekiranya ujian kemunasabahan harga harus didasarkan kepada harga pasaran harta semasa pendengaran permohonan untuk sanksi, ia akan bercanggah pula dengan dua prinsip undang-undang, iaitu bahawa mahkamah tidak boleh menulis semula perjanjian yang dimeterai pihak-pihak, dan kedua tiada pihak boleh mengambil kesempatan atas kesalahannya sendiri. Walau apa pun, mengambilkira fakta dan halkeadaan sekeliling, berhubung perkara yang berada di hadapannya, yang arif hakim telah melaksanakan budi bicaranya secara kehakiman dan oleh yang demikian keputusannya tidak memerlukan campurtangan di peringkat rayuan.

Oleh Mohd Ghazali Yusoff HMR

[1] Tiada merit dalam hujah perayu. Keterangan menunjukkan bahawa perayu dan lain-lain pewaris menyedari sepenuhnya tentang perjanjian, harga serta guaman sivil 1981. Juga jelas bahawa yang arif hakim, dalam membenarkan sanksi, telah membenarkannya dalam konteks terma dan tarikh perjanjian tersebut. Selain itu, perayu dan pewaris-pewaris lain tersebut, pada waktu material, tidak membantah penjualan. Tidak dinafikan juga bahawa harga RM1.60 se kaki persegi yang dipersetujui disokong oleh laporan penilaian dan bahawa nilai pengambilan harta hanyalah RM0.60 se kaki persegi.

[2] Pembeli adalah betul dalam mengatakan bahawa s. 60(4) Ordinan Probet dan Pentadbiran 1959 adalah tidak mempengaruhi kes semasa. Kesan peruntukan tersebut adalah bahawa suatu penjualan harta tak alih oleh pentadbir tidak akan mengikat atau berkuatkuasa kecuali ia mendapat kebenaran terdahulu dari mahkamah. Peruntukan tersebut jelas tidak terpakai

di sini, oleh kerana pemegang amanah, yang tugas utamanya adalah untuk menjalankan terma-terma amanah, sudah memiliki kuasa menjual sebelum memeterai perjanjian.

[3] Autoriti-autoriti yang dirujuk oleh perayu, iaitu *Yap Yoke Luan & Ors lwn. Ong Wee Tok & Ors, Che Ah dan Che Yang Kelsom lwn. Che Ahmad* dan *In Re The Estate of Tunku Mohmed Jewa ibni Almarhum Sultan Abdul Hamid* adalah boleh dibezakan dari segi fakta. Mereka menyentuh soal kontrak jualan bersyarat harta tak alih yang dimeterai oleh pentadbir pusaka yang mana ianya memerlukan izin mahkamah. Sebaliknya, dalam kes semasa, pemegang amanah mempunyai kuasa untuk menjual dan dalam melaksanakan kuasa itu, telah mengambilkira hak-hak pewaris termasuk dengan mendapatkan dahulu izin dari mereka. Selain dari itu, pewaris-pewaris telah bersetuju untuk menjual pada harga RM1.60 se kaki persegi dan perjanjian juga adalah sah dan mengikat. Oleh yang demikian, satu-satunya perkara yang perlu dibuat oleh pemegang amanah adalah memohon kepada mahkamah untuk mendapat sanksi untuk menjual harta.

[4] Dalam membenarkan sanksi, yang arif hakim mengatakan bahawa sanksi mesti diputuskan dengan merujuk kepada harga yang dipersetujui dan harga RM1.60 se kaki persegi yang dipersetujui adalah harga terbaik yang diperolehi untuk pewaris-pewaris. Yang arif hakim jelas mengambil kira semua faktor untuk pertimbangan, dan pelaksanaan budibicaranya tidak dicacatkan oleh apa-apa kesilapan. Yang arif hakim secara teliti telah mempertimbang semua fakta dan halkeadaan sekeliling dan dengan itu tidak bertindak seperti "rubber stamp" bila membenarkan sanksi.

[Rayuan ditolak.]

Case(s) referred to:

Che Ah and Che Yang Kelsom v. Che Ahmad [1941] 10 MLJ (FMSR) 126 ***(dist)***
Cheok Swee Lee & Ors v. Loo Choo Teng & Ors [1996] 3 CLJ 433 HC ***(refd)***
Cheok Swee Lee & Ors v. Loo Choo Teng & Ors [1997] 4 CLJ 587 HC ***(refd)***
In re the Estate of Tunku Mohmed Jewa ibni Almarhum Sultan Abdul Hamid, deceased [1982] 2 MLJ 44 ***(refd)***
Lee Lim Huat v. Yusuf Khan Ghows Khan & Anor [1997] 3 CLJ 197 CA ***(foll)***
Loo Choo Teng & Anor v. Cheok Swee Lee & Ors & Another Appeal [2000] 2 CLJ 389 CA ***(refd)***
Loo Choo Teng & Anor v. Cheok Swee Lee & Ors & Another Appeal [2001] 1 MLJ 216 CA ***(refd)***
New Zealand Shipping Co v. Societe des Ateliers et Chantiers de France [1991] AC 1 ***(foll)***
Yap Yoke Luan & Ors v. Ong Wee Tok & Ors [1983] 2 CLJ 252; [1983] CLJ (Rep) 433 FC ***(dist)***

Legislation referred to:
Probate and Administration Act 1959, s. 60(4)

For the appellant - Ghazi Ishak (Ong Kheng Leong); M/s Ghazi & Lim
For the 1st & 2nd respondents - Romesh Abraham (P Aruna); M/s Shook Lin & Bok
For the 3rd, 4th, 5th, 7th & 8th - R Rajasingam (RR Sethu); M/s R Rajasingam & Co

[Appeal from High Court, Pulau Pinang; Originating Summons No: 24-330-2000]

Reported by WA Sharif

JUDGMENT

Mohd Noor Ahmad FCJ:

I have had the benefit of reading the draft judgment of my learned brother Mohd. Ghazali Mohd. Yusoff JCA. I am in full agreement with him. However, I would like to add.

The only issue before us is whether the learned judge had under the circumstances exercised his discretion judiciously when he granted the sanction for the sale of the property upon the terms of the agreement, that is to say, at RM1.60 per square foot.

The following facts are beyond dispute and pertinent.

(1) The agreement was valid and binding upon the parties and the trustees had been ordered by the Court of Appeal to specifically perform it. In order to do so, under cl. 8 of the agreement the trustees had to apply to the court for a formal sanction to sell the property. Subsequently, the trustees applied for permission to sell the property to the purchasers at its market value as at the date of the approval by the court or at such other price as the court deems fit and proper.

(2) The value of the property at the date of the agreement (8 January 1979) was RM1.60 per square foot based on a valuation report obtained by the trustees and whereas the compulsory acquisition price was only RM0.60 per square foot. However, the market value of the property around the time when the permission to sell was sought was RM28 million, per valuation report as exhibited. When the agreement was entered into the appellant and the other beneficiaries agreed to sell at RM1.60 per square foot but they do not agree now in view of the current market value of the property.

(3) The reason why the sale and purchase was not performed by the trustees was not related to the consent of the beneficiaries or the value of the property but because of the compulsory acquisition of the property by the State which was released quite some time ago, and thereafter, the reason for the non-performance was due to a wilful refusal to perform the sale and purchase, rather than the non-fulfillment of any condition. In short, the trustees did not apply for the sanction for the last 19 years by reason of refusal to perform.

Premised on the aforesaid facts, the learned judge proceeded to determine whether or not to grant the sanction and at what price. He had meticulously considered those facts, in particular on the market value at the date of the agreement and the acquisition value and had decided as he did. To my mind, as RM1.60 per square foot was reflective of the then market price it is manifestly evident that the trustees had obtained the best price for the beneficiaries of the estate. Therefore, it is not apt to say that the learned judge had acted like a "rubber stamp" when he granted the sanction.

I decline to follow the cases of *Yap Yoke Luan & Ors v. Ong Wee Tok & Ors* [1983] 2 CLJ 252; [1983] CLJ (Rep) 433, *Che Ah and Che Yang Kelsom v. Che Mat* [1941] 10 MLJ (FMSR) 126, and *In Re the Estate of Tunku Mohmed Jewa ibni Almarhum Sultan Abdul Hamid, deceased* [1982] 2 MLJ 44. I need not repeat the facts of those cases as they had been elaborated in the judgment of my learned brother. Suffice for me just to restate the principle established in the aforesaid cases. The accepted principles adopted by the courts on an application for leave to sell a deceased estate are (i) the duty of the court is to protect the rights of the beneficiaries and not to consider the interests of the proposed purchaser (ii) in exercising its discretion the court will have to look into the facts and surroundings circumstances of the case, that is to say, whether the proposed sale was favourable to the beneficiaries and whether the administrators had acted with proper prudence in exercising their overriding duty to obtain the best possible price and (iii) the court is concerned that the price is a reasonable one not at the time the offer was made but at the time of hearing of the application. Be that as it may, the facts may vary from case to case and therefore, they can be distinguished, as done in the judgment of my learned brother. That being the case, it is unwise to apply the principle established in the aforesaid cases as a straightjacket to the present case which can be distinguished. To my mind, the learned judge in the exercise of his discretion had to a great extent adhered to the principle established in the aforesaid cases. He did scrutinize the facts and surroundings circumstances and by necessary implication, he was satisfied that the trustees had acted with proper

prudence to obtain the best price for the beneficiaries of the estate and that the proposed sale at RM1.60 per square foot, which was agreed to by the beneficiaries, was favourable to them. However, what the learned judge did not do is that he did not consider whether the price was a reasonable one at the time of the hearing of the application, but he based the reasonableness of the price at the date of the agreement. Was the learned judge wrong in this departure from the principle established in the aforesaid cases? In my view, both on principle and commonsense he was not. On principle, having regard to the facts and surrounding circumstances of the case at hand, if the test of reasonableness of the price was to be based on the market value of the property at the time of the hearing of the application, that would militate against two other principles of law. The first principle is that the Court cannot rewrite the parties' agreement (see *Law and Practice of Compromise* by David Foskett at p. 81, 4th edn and quoted with approval by the Court of Appeal in *Lee Lim Huat v. Yusuf Khan bin Ghows Khan & Anor* [1997] 3 CLJ 197). The second principle is that a party shall never take advantage of his own wrong (see *New Zealand Shipping Co. v. Societe des Ateliers et Chantiers de France* [1991] AC 1). On the first principle, the agreement clearly stipulated the sale price at RM1.60 per square foot. In respect of the second principle, it is evidently clear that the trustees did not apply for the sanction for so long by reason of refusal to perform. On commonsense, I decline to express of what is obvious to a reasonable man.

As the learned judge had exercised his discretion judiciously on the matter, his decision needs no appellate interference. Therefore, I will dismiss the appeal with costs. The deposit is to be paid to the 3rd to 8th respondents towards the account of taxed costs.

Mohd Ghazali Yusoff JCA:

These proceedings revolve around a piece of land previously known as Lot 532, Mukim 12, Daerah Barat Daya, Penang and now known as Lot No. 2347, Lot No. 2348, Lot 2349 and Lot No. 2350 all in Mukim 12, Daerah Barat Daya, Penang ("the property"). Ong Joo Sun, deceased ("the deceased") was, during his lifetime, the registered proprietor of the property. He died testate on 20 March 1960 and his will was proved on 13 December 1963.

On 25 August 1975, the High Court ordered, *inter alia*, that the deceased's estate ("the estate") be administered according to the terms of his will and that his immovable properties be sold and the proceeds of sale be paid into court to the credit of his estate. Meanwhile, by Notification No. 103 published in the Gazette on 25 April 1974, the State Government of Penang declared its intention to acquire the property.

By sale and purchase agreement dated 8 January 1979 ("the agreement"), Loo Choo Teng (the 1st respondent) and one Ong Thai Hong, described therein as the additional trustees of the estate appointed by an order of the court dated 15 August 1977 sold the property to the following persons, namely:

(i) Cheok Swee Lee (the 3rd respondent);

(ii) Loh Peng Kwan (the 4th respondent);

(iii) Loh Cheok Boon (the 5th respondent);

(iv) Loh Yip Seng (the 6th respondent);

(v) Loh Toa Thau @ Loh Eng Kim (the 7th respondent);

(vi) Loh Gan Teong (the 8th respondent);

(hereafter referred to as "the purchasers"). Ong Gaik Kee (the 2nd respondent) who was appointed as an additional trustee executed the agreement on behalf of the said Ong Thai Hong. I will hereafter refer to the 1st and 2nd respondents as "the trustees".

It was provided for in the agreement that the sale is subject to an order of court and the property being released by the State Government "from the restriction as published in the Government of Penang Gazette notification No. 9 of 1974 and all other Government restrictions whatsoever". It was also provided therein that the purchase price shall be RM1.60 per square foot. The purchasers paid to the trustees as deposit a sum of RM150,000 which was equivalent to approximately 5% of the total of the purchase price. The purchase was subject to, *inter alia,* the following terms:

(a) the property being released by the Penang State Government;

(b) the trustees deducing a good and marketable title to the property sold;

(c) the property sold to be free from all encumbrances whatsoever;

(d) without vacant possession;

(e) completion of the purchase to be within six months from the date of Court order sanctioning the sale by the trustees.

Clause 5 of the agreement provides if for whatsoever reasons the State Government refuse to release the property from the restrictions imposed under the Land Acquisition Act 1960 to the estate within two years from the date hereof, the agreement shall be null and void. Clause 7 provides the trustees

shall apply to the State Government for the release of the property back to the estate for sale to the purchasers. Clause 8 provides the trustees shall also apply to court for a formal sanction to sell the property in accordance with the Probate and Administration Ordinance 1959.

Vide Civil Suit No. 8 of 1981 in the High Court at Penang, the purchasers instituted proceedings against the trustees and the State Government of Penang for specific performance of the agreement ("the 1981 civil suit"). The action against the State Government was later discontinued.

The appellant, one of the original executors and trustees of the deceased's will, on his application, was added as a defendant in the 1981 civil suit. At the end of the day, the learned judge in the 1981 civil suit ordered that the trustees do specifically perform the agreement; he also made the following orders:

(i) that the purchasers are to pay the balance sum (less RM361,114.80) into Court on or before 8 October 1997;

(ii) that the trustees are to deliver the documents of title to the property on or before 8 October 1997;

(iii) that the trustees, within seven days from the date of payment of the balance sum (less RM361,114.80) are to execute (and or procure the execution) a good and registrable transfer of the property free from all encumbrances in favour of the purchasers and deliver the memorandum of transfer duly executed to the purchasers' solicitors.

The learned judge also ordered that in the event of the trustees failing to comply with directions (ii) and or (iii) above, it is ordered that:

(iv) the Registrar of Titles do cancel the present document of titles to the property and issue replacement titles to be collected by the purchasers; and

(v) the learned senior assistant registrar do execute the aforesaid memorandum of transfer in favour of the purchasers.

The learned judge further ordered that the trustees pay the purchasers the costs of the action. His judgment was reported in the Current Law Journal (*Cheok Swee Lee & Ors v. Loo Choo Teng & Ors* [1997] 4 CLJ 587).

The trustees appealed. The appellant, the 4th defendant in the 1981 civil suit, also appealed. Thus, there were two appeals before the Court of Appeal, *viz.*, the trustees were the appellants in Civil Appeal No. 556/97 and the appellant here was the appellant in Civil Appeal No. 593/97. Both appeals were dismissed by the Court of Appeal. In delivering the judgment of the Court of Appeal, which was reported in the Malayan Law Journal (*Loo Choo Teng & Anor v. Cheok Swee Lee & Ors and Another Appeal* [2000] 2 CLJ 389), Gopal Sri Ram JCA said (at p. 400):

> Having satisfied myself of the existence and the width of the jurisdiction in equity, I would vary the order of the learned judge by decreeing specific performance on terms that the vendors apply to court for formal sanction as provided in cl. 8 of the sale and purchase agreement. Such application shall be made not later than seven days from the date of this judgment. In the event the vendors make default, the plaintiffs shall be at liberty to seek approval from the court for the sale of the subject property to them. Should sanction be refused by the court, it would be open to the vendors to move for the decree to be vacated on the ground of impossibility of performance. Additionally, the parties are generally at liberty to apply to the High Court for such orders or directions as may be necessary to give effect to the decree hereby granted.

As a result of the decision of the Court of Appeal, the trustees, by way of Originating Summons No. 24-330-2000, which is the subject-matter of this appeal before us, sought the following reliefs:

(a) that they (ie, the trustees) be given permission to sell the property pursuant to cl. 8 of the agreement and in accordance with the Probate and Administration Act 1959; and

(b) that the permission as aforesaid be given to them (ie, the trustees) to sell the property to the purchasers at its market value as at the date of approval of this court or at such other price as the court deems fit and proper.

It was endorsed on the summons that the trustees were seeking the reliefs on the ground that the property belongs to the estate and in connection thereto there was a requirement to obtain the permission of the court for the sale pursuant to cl. 8 of the agreement and in accordance with the Probate and Administration Act 1959 and the order of the Court of Appeal. The purchasers and the appellant here were named defendants.

At the end of the day, the learned judge granted the first relief sought, *viz.*, that formal sanction is granted to the trustees for the sale of the property upon the terms of the agreement, namely, at RM1.60 per square foot. The learned judge refused the second prayer sought, *viz.*, that "permission" be given to the trustees to sell the property to the purchasers at its market value.

Against that decision the appellant appealed. The trustees did not appeal. As discussed earlier, the appellant, on his application, was added as a defendant to the 1981 civil suit. In his grounds of decision in the 1981 civil suit *(Cheok Swee Lee & Ors v. Loo Choo Teng & Ors, supra)* the learned judge had in relation to the appellant (the 4th defendant) said (at p. 591):

> As for the 4th Defendant, he was added as a party, on his application, to the proceedings. The 4th Defendant's pleaded defence, having abandoned and then reclaimed his amended defence in the course of the trial, is that the 1st Defendant and Ong Thai Hong had no authority to enter into the agreement and that the land was the subject matter of the acquisition.

His appeal to the Court of Appeal against the decision of the learned judge in the 1981 civil suit, as mentioned earlier, was dismissed.

Before us, the appellant's counsel referred to cl. 8 of the agreement and the decision of the Court of Appeal. As discussed earlier, the Court of Appeal varied the order of the learned judge by decreeing specific performance on terms that the trustees apply to court for formal sanction as provided for in cl. 8 of the agreement. It was also ordered that the application shall be made not later than seven days from the date of the judgment and that in the event the trustees make default, the purchasers shall be at liberty to seek approval from the court for the sale of the property to them and should sanction be refused by the court, it would be open to the trustees to move for the decree to be vacated on the ground of impossibility of performance. It was further ordered that the parties are generally at liberty to apply to the High Court for such orders or directions as may be necessary to give effect to the decree thereby granted.

The appellant's counsel explained the appeal is against the decision of the learned judge in granting sanction to the sale of the property at the price of RM1.60 per square foot. He pointed out that before the learned judge the trustees had exhibited in their affidavit a valuation report which reflected that the market value of the property as at 17 July 2000 was RM28 million and that that valuation report was never challenged. Counsel did not however elaborate further as to who bore the burden of making such a challenge and or the purpose of making such a challenge. Be that as it may, he pointed out that the learned judge "admitted" that the market value was RM28 million and "was cognizant" that the market value was as such.

Counsel contended the Court of Appeal had made an order which gives the learned judge room to exercise his discretion and had also "made provisions for sanction to be refused" but the learned judge took the view that the application for sanction was a mere formality. Counsel then attacked the decision of the learned judge. He argued that when sanction is applied for, the Court should not be a "rubber stamp" and "follow the price of RM1.60 per square foot" but "should follow market value". He insisted that the learned judge did not exercise his discretion in accordance with decided principles, namely:

(a) he failed to consider that as this was a sale of trust property, the following matters are paramount:

(i) to obtain the best possible price for the estate;

(ii) that the time for determining the price is at the time of the hearing of the application for sanction notwithstanding that the price was reasonable at the time of the agreement;

(b) he failed to protect the rights of the beneficiaries or rights of the estate, namely, he failed to take into account the value of the property at the time sanction was to be granted;

(c) he took the purchasers' rights into account and not that of the beneficiaries; his decision goes against the principle of "best possible price".

The appellant's counsel then referred to *Yap Yoke Luan & Ors v. Ong Wee Tok & Ors* [1983] 2 CLJ 252; [1983] CLJ (Rep) 433 which he submitted is "on all fours". He also referred to *Che Ah and Che Yang Kelsom v. Che Ahmad* [1941] 10 MLJ (FMSR) 126, and *In Re the Estate of Tunku Mohmed Jewa ibni Almarhum Sultan Abdul Hamid, deceased* [1982] 2 MLJ 44 which were cited by Syed Agil Barakbah FJ in *Yap Yoke Luan & Ors v. Ong Wee Tok & Ors*.

In *Yap Yoke Luan & Ors v. Ong Wee Tok & Ors*, the dispute revolved around the purchase of land belonging to the estate of Ong Sing Keng who died intestate. The 1st and 2nd respondents were the administrators and the other respondents were the beneficiaries of the estate. The facts showed that the administrators executed a written agreement for the sale of the said land with the appellants who agreed to purchase it free from encumbrances subject to court approval as specified in cl. 2 of the agreement. On the execution of the agreement the appellants paid the sum of $45,000 by way of deposit and the receipt thereof was acknowledged by the administrators. It was also agreed vide

cl. 6 of the agreement that in the event that leave of court was not obtained, the administrators would refund the said deposit. There was no dispute that the administrators failed to apply for leave as undertaken by them in cl. 2 of the agreement. As a result of their inaction, the appellants filed a suit against the administrators and obtained an order from the High Court, Kuala Lumpur ordering the administrators to apply to the relevant High Court for leave to sell and transfer the said land within 14 days from the date of the order failing which the appellants were empowered to apply on their behalf. In compliance with the court order the administrators filed an application by way of originating summons in the High Court, Seremban. Only the beneficiaries were cited as respondents as a result of which the appellants successfully applied to be added as the intervenors. The originating summons was heard and was dismissed with costs. The appellants appealed. The Federal Court dismissed the appeal. In delivering the judgment of the court, Syed Agil Barakbah FJ said:

> In this regard we are of the view that the appellants as the proposed purchasers under a conditional contract were perfectly well aware that their contract had to be approved by the Court before it could be carried out into effect and they had taken the risk of losing their bargain if the Court refused to grant such approval. The duty of the Court is to protect the rights of the beneficiaries and not to consider the interests of the proposed purchaser. In exercising its discretion the Court will have to look into the facts and surrounding circumstances of the case ie, whether the proposed sale was favourable to the beneficiaries and whether the administrators had acted with proper prudence in exercising their overriding duty to obtain the best possible price. The Court is concerned that the price is a reasonable one not at the time the offer was made but at the time of hearing of the application for approval of the proposed sale. ... We agree with respect with the learned judge that the purchase consideration of $150,000.00 was manifestly low in the light of the valuation of the market value of $244,000.00 for the said land at the material time. It was apparent that the administrators had failed to carry out their duty as trustees to obtain the best possible price. Since most of the beneficiaries had not been consulted nor their consent been obtained, the administrators should have applied the common-sense rule of calling for a valuation report. ... The fact that the appellants have paid 30% deposit and incurred expenses while in occupation of the said land may be a matter for consideration by the Court but that cannot and does not override the duty of the Court to see that the estate benefits as much as possible.

In *Che Ah and Che Yang Kelsom v. Che Ahmad,* the administrator of an estate applied to court for leave to sell certain land which he had verbally agreed to sell at the price of $12,777.50 subject to approval of the court. The Court of Appeal held that it is not for the court to consider the interests of the purchaser who is well aware of the risks he runs in entering into a conditional contract. The duty of the court is to protect the rights of those interested in the property and it is immaterial that at the time the offer was made the price was a reasonable one.

In *In Re the Estate of Tunku Mohmed Jewa ibni Almarhum Sultan Abdul Hamid, deceased,* Syed Agil Barakbah J (as he then was) said:

> The accepted principles adopted by the courts in cases where administrators apply for leave to sell, having executed a conditional contract subject to the leave of the court with purchasers and a beneficiary objecting to the contract thereof produces a higher offer is a *prima facie* duty to see that the estate benefits as much as possible. The duty of the court is to protect the rights of those interested in the property and it is immaterial that at the time the offer was made the price was a reasonable one.

Premised upon the above, the appellant's counsel urged the court to allow the instant appeal with costs.

The trustees' counsel declined to proffer any views and left the matter to the court.

In response, the purchasers' counsel contended the appellant cannot challenge the grant of the sanction. He pointed out that the appellant is a beneficiary of the estate but was not a party to the agreement and that no other beneficiary was served or appeared when the application for sanction was sought. Further, the appellant was not the applicant in the court below and had not even filed any affidavit. Counsel also pointed out that the application for sanction was a continuation of the 1981 civil suit. When the purchasers filed the 1981 civil suit, the appellant on his own initiative applied to be joined as a defendant and filed a defence. In that suit, the purchasers claimed no relief against the appellant. The appellant also did not lodge any counterclaim to set aside the agreement. His stand throughout was that his consent had not been obtained prior to the execution of the agreement.

The purchasers' counsel argued when the Court of Appeal directed the trustees to apply for formal sanction, the Court of Appeal expressly did so to comply with cl. 8 of the agreement. The only parties to the agreement were the trustees and the purchasers and no one else.

I have noted that in his statement of defence in the 1981 civil suit, the appellant denied the validity of the agreement and averred that the trustees could not lawfully enter into the agreement without the prior approval of the court and without his prior approval. He also alleged the following:

(a) that the trustees had exercised their powers in breach of trust, improperly and without lawful authority;

(b) that the purchasers were aware that the trustees did not have lawful authority to enter into the agreement;

(c) that even if the agreement was valid, which is denied, the agreement had been terminated as the property was not released from the notice of acquisition within a period of two years from the date of the agreement.

Counsel pointed that the appellant's attempt to amend his statement of defence in the 1981 civil suit 14 years after the close of pleadings, wherein he proposed to, *inter alia*, challenge the authority of one of the trustees to execute the agreement, namely, the 2nd respondent here and to aver that the purchase price stated in the agreement was below market value and that the sale of the property was against the interest of the estate as a whole, was dismissed by the learned judge (see *Cheok Swee Lee & 5 Ors v. Loo Choo Teng & 3 Ors* [1996] 3 CLJ 433).

Premised upon the above, counsel argued the issue of fair value was not within the perimeters of the present appeal. Since the appellant had failed to raise that issue in the 1981 civil suit, he cannot now raise it. There is a bar personal to him. Counsel pointed out the appellant did attempt to adduce evidence of current value of the property in the 1981 civil suit even though he was not party to the agreement and that no relief was sought against him but it was disallowed by the judge on the grounds that it had not been pleaded and that no relief was sought against him.

As mentioned earlier, the Court of Appeal had dismissed the appeal by the trustees and the appellant against the decision of the learned judge in the 1981 civil suit. The Court of Appeal upheld the learned judge's finding that the agreement was valid and binding upon the parties. In delivering the judgment of the court, Gopal Sri Ram JCA said:

> In the present instance, it is amply clear that the learned judge failed to consider sufficiently, or at all, the effect of cl. 8 when exercising his discretion to decree specific performance. This is therefore a case which in my view warrants appellate interference. However, having regard to the special circumstances of this case it would, in my judgment, be unjust to the plaintiffs to deny them specific relief altogether. It must not be forgotten that there is here a contract for the sale of immovable property. It is the kind of obligation that statute rebuttably presumes to be incapable of being remedied by an award of monetary compensation. (See, s. 11(2) of the Specific Relief Act 1950). Moreover, this appears to be a case where the vendors, having entered into a perfectly valid transaction went about inventing all sorts of excuses to get out of it. Having failed in their efforts, it would be quite wrong to permit them to succeed, as it were, on the strength of a mere side-wind. The main obstacle envisaged by the parties to the sale was the State's refusal to release the subject property from compulsory acquisition. That hurdle having been crossed, all that remains is the mere formality of obtaining the court's sanction for the sale. This is therefore an appropriate case to decree specific performance, not as ordered by the learned judge, but on terms.

Thus, the only thing remaining to finalize the agreement made between the trustees and the purchasers is the "mere formality of obtaining the court's sanction for the sale". The trustees made the application and the learned judge granted the sanction for the sale of the property upon the terms of the agreement, namely, at RM1.60 per square foot. The appellant appealed against that decision and the matter is now before us.

What attracted my attention was the fact that in pursuing the application for sanction, the trustees did not name or omitted to include Loh Gan Teong (the 8th respondent) who was one of the purchasers as defendant but saw it fit to name the appellant as one. When the matter came up for hearing before the learned judge, the omission was discovered and by consent, Loh Gan Teong was added as defendant.

At the hearing before the learned judge, the trustees forwarded the same arguments as canvassed by the appellant, namely, that the rights of the beneficiaries are superior to the rights of the purchasers and that the time for determining the price is the current price at the time sanction is applied for notwithstanding that the price might have been a fair price at the time the agreement was entered into. The trustees pointed out that when the agreement was entered into, the appellant and the other beneficiaries agreed to sell at RM1.60 per square foot but they do not agree now because of the current value of the property. Although the trustees admitted that the appellant and the other beneficiaries only voiced their objections after the decision of the Court of Appeal in the year 2000, the trustees urged the court to consider the current price when granting the sanction.

Before the learned judge, the appellant's counsel submitted the appellant, being one of the beneficiaries, had a right to object to the sale at RM1.60 per square foot. He insisted that the court had a duty to protect the interest of the estate as a whole. It was conditional sale and the Court of Appeal ordered sanction as "a pre-condition". What is important is whether the sale would benefit the estate and whether the price is reasonable, given the present circumstances. Given the wide discrepancy, namely, that RM1.60 per square foot is not a reasonable price, sanction should be refused.

Before the learned judge, the purchasers' counsel pointed out the Court of Appeal upheld the finding of the court in the 1981 civil suit that the agreement was valid and binding upon the parties. As to the price, counsel contended the material date for valuation was the date of the agreement, *viz*., 8 January 1979. He also pointed out that the acquisition price was RM0.60 per square foot whereas the sale price was RM1.60 per square foot. The property was valued by the trustees. The reason why the sale and purchase was not performed by the trustees was not because of consent or value but because of the acquisition and the reason for the non-performance was because of a wilful refusal to perform the sale and purchase, rather than the non-fulfillment of any conditions. There was a failure to apply for sanction due to refusal to perform. Counsel further contended that it is not open to the trustees to come to court to seek sanction and simultaneously apply for a new valuation. The Court of Appeal only wanted cl. 8 to be considered and that all that was lacking was the formal sanction.

In my view, the only issue before us is whether the learned judge had under the circumstances exercised his discretion judiciously when he granted sanction for the sale of the property upon the terms of the agreement, namely at RM1.60 per square foot. I note that according to the *Concise Oxford Dictionary* (9th edn), the word "sanction", *inter alia*, means "confirmation" or "ratify".

In the 1981 civil suit, in dealing with the appellant's averment that he had not given his consent for the sale of the property, the learned judge said:

> On the 4th defendant's denial that he had not given his consent for the sale, he was not only not supported by the documentary evidence (he was informed, on 12 October 1977, of the proposed sale at RM0.40 p.s.f. see PB3(3-5); he was informed, on 1 March 1979, of the sale – see PB1(12); there is no record of the 4th defendant's objection to the sale in the minutes of the meeting of the trustees and beneficiaries – se PB3(12-14); the 2nd defendant's letter to all beneficiaries, and it was not controverted by the 4th defendant has it that every beneficiary agreed to the sale at RM1.60 p.s.f. – see PB3(16-18), a bare denial as such, but was also devoid, so it is perceived, of all *bona fides*.

In the 1981 civil suit, in relation to the position of the trustees in administering the estate at the material time the agreement was entered into, the learned judge said:

> It would appear therefore that the 1st defendant and Ong Thai Hong, as of 15 February 1978, were the only trustees of the Estate with administrative powers (the 4th defendant with Boey Khoon Heng effectively sidelined) and that the 2nd defendant appointed a trustee on 8 January 1979 was empowered to sign and execute all documents relating to the administration of the Estate "in substitution" of the 4th defendant and Boey Khoon Heng. Furthermore, by a Power of Attorney dated 5 October 1978, the said Ong Thai Hong appointed the 2nd defendant his lawful attorney to carry out his duties qua trustee of the Estate. Therefore, on 8 January 1979, both the 1st and 2nd defendants (in the case of the 2nd defendant, as attorney if not trustee) were the only persons empowered to administer the Estate.

What is clear from the above findings made by the learned judge were the following:

(a) prior to the execution of the agreement, the appellant as beneficiary gave his consent for the sale of the property;

(b) on the date the agreement was executed, the trustees (the 1st and 2nd respondents here) were the only persons empowered to administer the estate.

Before us, the appellant complained that despite his objection, the learned judge granted the sanction. I cannot see any merit in his complaint. The evidence showed the appellant and also the other beneficiaries were fully aware of the agreement, the price and the 1981 civil suit. The trustees failed to apply for sanction after the property was released from the intended proposed acquisition by the State Authority in 1984. Clause 8 of the agreement made it mandatory for the trustees to apply to court for "a formal sanction" to sell the property in accordance with the Probate and Administration Ordinance 1959. There was no term in the agreement that the purchasers should apply for such sanction. When the learned judge granted the sanction, it was confined to the terms of the agreement and as at the date of the agreement. In his grounds of decision in granting the sanction, which was reported in the Malayan Law Journal (*Loo Choo Teng & Anor v. Cheok Swee Lee* [2001] 1 MLJ 216), the learned judge reiterated what he said in *Cheok Swee Lee & Ors v. Loo Choo Teng & Ors*, *supra*, at pp. 618-619 of the reported judgment, *viz*.:

In the instant case, the 1st and 2nd defendants had an express duty (cl. 8) to apply for that formal consent, the general duty to co-operate and not to prevent the fulfillment of cl. 8 (applying *Mackay v. Dick (supra)*) to act bona fide (perhaps reasonably) to procure the fulfillment of cl. 8 (applying *Hudson v. Buck (supra)*). The said agreement will be construed so far as possible in such a manner as not to permit the defendants to take advantage of the 1st and 2nd defendants' failure to perform cl. 8 (see *Rede v. Farr* [1817] M & S 121, where a tenant who had failed to pay his rent asserted that by reason of a proviso re-entry his lease was at an end. Lord Ellenborough said "... this provision ... would be contrary to an universal principle of law, that a party shall never take advantage of his own wrong ...". In *New Zealand Shipping Co v. Societe des Ateliers et Chantiers de France* [1919] AC 1, Lord Atkins said: "But if the stipulation be that the contract shall be void on the happening of an event which one party or other of them can by his own act or omission bring about, then the party, who by his act or omission brings that event about, cannot be permitted either to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case in a roundabout way, but either way putting an end to the contract") such that the defendants cannot rely on their own failure to apply for formal consent as bringing the agreement to an end.

The trustees had the power of sale. The appeal records (at p. 203) showed that on 25 August 1975, in Originating Summons No. 156 of 1975, the High Court at Penang ordered that the deceased's immoveable property "be sold with the approbation of the judge free from encumbrances, (if any), and subject to the encumbrances (if any) of such of them as shall be agreed upon ...". Thus the court had already given the trustees power to sell the property subject to affirmation by a judge. The appellant and also the other beneficiaries did not object to the sale at the material time. Further, at the time of the sale in 1979, a valuation report was obtained. It was also not disputed that the acquisition value was only RM0.60 per square foot.

I would agree with the submission of the purchasers' counsel that s. 60(4) of the Probate and Administration Act 1959, which provides that "an administrator may not, without the previous permission of the court: (a) ... transfer by sale ... any immovable property ...", has no bearing upon the circumstances here. The effect of that provision is that a sale of immovable property by an administrator would not be binding or enforceable unless he has the previous permission of the court. That provision is certainly not applicable here. The trustees prime duty is to carry out the terms of the trust. They already had the power to sell prior to entering into the agreement.

I am of the view that the cases referred to by the appellant's counsel can clearly be distinguished on the facts. In *Yap Yoke Luan & Ors v. Ong Wee Tok & Ors, supra*, the deceased died intestate. The administrators (the respondents) executed a written agreement for the sale of the land in question with the purchasers (the appellants) who agreed to purchase it free from encumbrances subject to court approval. The other respondents were the beneficiaries of the estate. It was agreed that in the event that leave of court was not obtained, the administrators would refund the deposit paid. The administrators failed to apply for leave. The purchasers filed a suit against the administrators and obtained an order from the High Court at Kuala Lumpur ordering the administrators to apply to the relevant High Court for leave to sell and transfer the land. In compliance with the court order the administrators filed an application by way of originating summons in the High Court at Seremban citing the beneficiaries as respondents. The purchasers were allowed to intervene. The originating summons was dismissed. The purchasers' appeal to the Federal Court was also dismissed. The learned High Court Judge found that the purchase consideration of $150,000 was manifestly low in the light of the valuation of the market value of $244,000 for the said land at the material time. It was also found that the administrators had failed to carry out their duty as trustees to obtain the best possible price. The facts showed that most of the beneficiaries had not been consulted nor their consent been obtained neither did the administrators called for a valuation report before entering into the conditional contract.

The facts and circumstances found in *Che Ah and Che Yang Kelsom v. Che Ahmad, supra*, and *In Re the Estate of Tunku Mohmed Jewa ibni Almarhum Sultan Abdul Hamid, supra,* referred to by the appellant's counsel, also dealt with conditional contracts of sale of immovable property entered into by administrators of estates which required leave of the court.

In the present case on appeal before us, the facts and the surrounding circumstances were clearly different. The trustees had the power to sell and in exercising that power, had taken into regard the rights of the beneficiaries including obtaining their prior consent. The evidence showed that every beneficiary agreed to the sale at RM1.60 per square foot. The agreement was a valid agreement and was binding on the trustees and purchasers. The only thing left to be done by the trustees was to apply to court for a formal sanction to sell the property. The learned judge had meticulously considered all the facts and the surrounding circumstances before arriving at the decision that he did. As observed by Gopal Sri Ram JCA in *Loo Choo Teng & Anor v. Cheok Swee Lee & Ors, supra*, "this appears to be a case where the vendors, having

entered into a perfectly valid transaction went about inventing all sorts of excuses to get out of it". His Lordship then went on to say as follows (at pp. 399-400):

> The main obstacle envisaged by the parties to the sale was the State's refusal to release the subject property from compulsory acquisition. That hurdle having been crossed, all that remains is the mere formality of obtaining the court's sanction for the sale.

Before us, the appellant's counsel argued that "when sanction is applied for, the court should not be a rubber stamp and follow RM1.60 per square foot and should follow market value". The Court of Appeal had decreed specific performance and stated that "all that remains is the mere formality of obtaining the court's sanction for the sale". In his grounds of decision in granting sanction, the learned judge held the sanction must be determined with reference to the agreed price and that the agreed price of RM1.60 per square foot at the date of the agreement was the best price obtained for the beneficiaries. Looking at his grounds of decision, I do not think that the learned judge had acted like a "rubber stamp" when he granted the sanction. In relation to the application itself, he observed:

> Strictly speaking, there is no application for formal sanction to sell the said land upon the terms of the agreement. Only, this application 'for permission to sell the said land at the market value of the said land at the date of the approval by this honourable court, or at such other price as this honourable court deems fit and proper'.

After giving due consideration to the facts and the surrounding circumstances, the learned judge said:

> Specific performance was ordered, at RM1.60 psf. This proceedings cannot nullify that result. Sanction or no sanction must be decided, with the agreed price being the price. If the instant plaintiffs had applied for formal sanction in accordance with the agreement, RM1.60 psf would have been the price before the court, and RM1.60 psf, would have been reflective then of the market price. As correctly said by Dato' Sethu for the instant first to fifth and seventh defendants, the trustees of the estate themselves valued the said land at RM1.60 psf. In other words, the instant plaintiffs had obtained the best price for the beneficiaries of the estate (*Buttle & Ors v Saunders & Anor* [1950] Ch D 193). Not surprisingly, the beneficiaries themselves, who were duly informed of the sale, did not object to the sale (see p. 28 of the notes of evidence – *Cheok Swee Lee & Ors v. Loo Choo Teng & Ors*). Mr Abraham said, and Mr Ong agreed, that at the material time the instant sixth defendant agreed to the sale at RM1.60 psf. If an application for formal sanction had been made in accordance with the agreement, there would have been no reason

to refuse formal sanction. Formal sanction, as the Court of Appeal said, was '[a] mere formality ...'. Reasonably, formal sanction for the sale would not have not been given. That being the case, then on the alternate prayer of the instant plaintiffs for 'permission to sell at such other price as this honourable court deems fit and proper' (and that alternate prayer invites the court to grant formal sanction to sell upon the terms of the agreement), it is only just and equitable, so as to put the parties to the position had the agreement been performed as agreed, that formal sanction be granted for the sale of the said land upon the terms of the agreement. The reasons given for refusal of formal sanction are just not acceptable.

At the end of the day the learned judge granted formal sanction to the trustees for the sale of the property upon the terms of the agreement, namely, at RM1.60 per square foot. I am of the view that the learned judge had taken all factors into consideration and I find nothing wrong with his exercise of discretion in granting the sanction. For these reasons, I would dismiss this appeal with costs and order that the deposit be paid to the 3rd to 8th respondents towards the account of taxed costs.